Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-648

ROY B. WOOLSEY,

Petitioner,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION,

Respondents.

C. NEIL ASH and ELAINE T. ASH,

Petitioners,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION,

Respondents.

Joint Appendix to Separate Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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JOINT APPENDIX.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

The Valley National Bank of Arizona, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3388.

Roy B. Woolsey, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 78-1227.

C. Neil & Elaine T. Ash, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3662.

Appeal from the United States District Court for the Southern District of California.

Filed: May 30, 1979.

Before: CARTER and ANDERSON, Circuit Judges, and ROBERT M. TAKASUGI, District Judge.*

CARTER, Circuit Judge:

These consolidated appeals seek to negate the effects of a merger between Air California, Inc., and Westgate-Wacco, Inc., (hereafter Wacco). The former was a publicly-held corporation, 81% of the stock of which was owned by the Westgate-California Corporation (hereafter Westgate), and the latter was a new, wholly-owned subsidiary of Westgate. The merger was sought by Curvin J. Trone, Jr. and Herbert Kunzel in their capacities as trustees in bankruptcy for Westgate, a holding company involved in reorganization proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C.

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*Honorable Robert M. Takasugi, District Judge, Central District of California, sitting by designation.

§ 501 et seq. The merger was approved by the Reorganization Court on October 12, 1977, and the same day, it was consummated. Westgate then owned 100% of the surviving company, Wacco, which immediately changed its name to Air California. Shareholders of the old Air California Corporation were given certificates in Westgate on a one-for-one basis, which were redeemable at the option of the holder for $15 each. In sum, the effect was to turn Air California from a publicly-held corporation to one wholly owned by Westgate.

Appellants here cite various errors allegedly made by the Reorganization Court below. The Valley National Bank of Arizona (hereafter Valley) held 78% of the outstanding shares of Air California as security on a loan it made to Westgate. The essence of Valley's argument is that changing its collateral from shares in a publicly-held corporation to shares in a privately-held corporation constituted impairment of its security in violation of the Fifth Amendment to the U.S. Constitution because it was a "taking" without just compensation and without due process of law. Other alleged errors, dealing with sufficiency of the evidence and burden of proof, are ancillary to this central issue. Valley seeks to have the order granting the merger reversed so that its collateral can be fully restored. We find no reversible error and we therefore affirm the decision of the Reorganization Court as it applies to Valley.

Woolsey disputes the sufficiency of the evidence to support findings of fact as to the fairness, justice and equity of the merger plan, and related findings. We find the evidence to be legally sufficient to support such findings and we affirm as to Woolsey.

The Ashes contend that the Information Statement which announced the proposed merger to Air California shareholders and which explained the reasons for and terms of the merger, inadequately disclosed certain information regarding conflicts of interest of persons involved, prior stated value of the Air California shares, and facts relating to promotional conditions attached to some of the shares which apparently decreased their value. These defects in disclosure, the Ashes argue, constituted violations of Section 14(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n. They also contend that the directors of Air California followed improper procedures when voting in the merger. As with Valley and Woolsey, we see no merit in the Ashes' contentions and we affirm the decision of the Reorganization Court as it applies to them as well.

The facts relevant to this appeal show that the trustees of Westgate filed with the Reorganization Court on November 30, 1976, an application to effect the merger between Wacco and Air California. Among other things, the application sought permission for the trustees to invest money to effect the merger, to pledge an appropriate portion of the stock of the surviving company to Valley as collateral on its loan, and to determine the fair value of Air California's publicly-held shares so that holders of those shares could be adequately protected in the event of the merger. The application was accompanied by a definitive "Information Statement in Conjunction with a Special Meeting of Shareholders of Air California to be held on December 21, 1976" (hereafter Information Statement) which, in some detail, announced the terms of the merger, its purposes, the parties involved, and

other facts important to the shareholders.[1] The Information Statement also announced that the merger would be voted on at the December 21 meeting. The merger was approved by the shareholders at that meeting.[2] The Reorganization Court conducted evidentiary hearings on the proposed merger on January 14 and October 4, 1977. All parties to these appeals were present during those hearings and presented evidence in support of their respective positions.

After weighing the evidence and considering all the facts, the Reorganization Court ordered the merger approved on October 12, 1977. The order authorized the trustees to borrow and expend funds to implement the merger, directed them to consummate it as soon as practicable, and made other specific mandates. The Court also made findings of fact and conclusions of law. The merger was, in fact, completed the same day it was approved. All former public shareholders were issued Westgate certificates to replace their Air California shares. Many of them have since redeemed those certificates for cash. Of approximately 1,000 former public shareholders of Air California, only Woolsey and the Ashes continue as parties to litigation related to the merger or have otherwise submitted themselves to the jurisdiction of this court.

Neither Woolsey nor the Ashes sought a stay of the order approving the merger. Valley sought stays—both informally before the order was granted and formally thereafter—but its motions were denied by the Reorganization Court. No appeal from the denial of

[1]Allegedly important facts left out or deemphasized in the Information Statement will be discussed more fully below.

[2]The outcome was a foregone conclusion because Westgate held more than enough shares to vote for approval.

those motions was taken; rather, Valley sought a stay in this court. This was also denied. These appeals follow. For reasons stated more fully below, we find no merit to the appellants' arguments and we therefore affirm the judgment of the Reorganization Court.

I. ISSUES RAISED

Although the three appellants allege a host of errors, we find it necessary to comment in detail on only the following:

A. As to Valley National Bank: Did the merger result in a reduction in the value of Valley's collateral so as to constitute a "taking" in violation of the Fifth Amendment to the Constitution?

B. As to Woolsey: Was there evidence to support the Reorganization Court's finding that the merger was fair, just and equitable as to the minority shareholders? Was the Reorganization Court's finding that three directors of Air California who were also trustees (Trone and Kunzel) or a director (James W. Leisner) of Westgate fulfilled their fiduciary obligations to the public shareholders of Air California supported by substantial evidence?

C. As to the Ashes: Was there adequate disclosure in the Information Statement?

D. Did consummation of the merger, coupled with inaction on the part of all three appellants, cause this appeal to become moot?

II. DISCUSSION

A. *Valley National Bank*

As noted above, the merger changed Air California from a publicly-held corporation to one privately held and wholly owned by Westgate. The collateral which

Valley held for the loan it had given Air California had previously been Air California stock owned by Westgate but otherwise marketable to the public. The order granting the merger authorized the substitution of Wacco (now called Air California) stock for the old Air California stock. Because the new collateral could not be traded on the public market, Valley argued below and argues here that the value of its collateral was reduced and that this constituted a taking violative of the Fifth Amendment.

The Reorganization Court found that the value of Valley's collateral was not reduced by the merger; on the contrary, its value was actually increased so that Valley's loaned funds remained secure.[3] Valley disputes this finding, devoting major portions of its briefs to a summary of evidence allegedly in conflict with this finding. We have examined the evidence before the Reorganization Court, and while we note certain conflicts, we see no reason to conclude that the Court's finding here is clearly erroneous. Rule 52(a), Fed. R. Civ. P.; *Thompson v. England,* 226 F.2d 488 (9th Cir. 1955). We do not choose to disturb it.

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[3]The Reorganization Court found that ". . . notwithstanding the absence of a public market for Wacco stock, the economic value of the Wacco shares proposed to be pledged to Valley is at least equivalent to the value of the collateral heretofore held by Valley. By reason of the fact that none of the pledged Wacco shares will have promotional conditions affixed thereto, while a significant number of the Air California shares held by Valley do have such conditions . . . and by reason of the fact that as a consequence of the merger Air California will receive additional equity capital through the exercise of stock options, the Court finds that the value of the pledged Wacco shares is substantially in excess of the value of the pledged Air California shares. Furthermore and in any event, the value of the proposed collateral is substantially in excess of the maximum amount of Valley's claim." Finding of Fact X, Record on Appeal at pp. 2594-95.

Valley takes its argument one step further by claiming that regardless of whether the value of its collateral is reduced, the fact that the merger resulted in a change in its nature or character (from public to private shares) made that change a "taking" in violation of the Fifth Amendment, citing *Security-First National Bank v. Rindge Land & Navigation Co.,* 85 F.2d 557 (9th Cir. 1936) and *In re Los Angeles Lumber Products Co.,* 24 F. Supp. 501 (S.D. Cal. 1936), *rev'd on other grounds sub nom. Case v. Los Angeles Lumber Products Co.,* 308 U.S. 106 (1939). But in both of those cases, the critical defect in the alteration of the collateral was the reduction in its value rather than the mere change in its nature or character. In *Security-First National Bank,* this court found that the reduction of a complaining creditor's debt by 60% violated bankruptcy law as well as the Fifth and Fourteenth Amendments. In *Los Angeles Lumber Products,* the district court condemned any attempt to scale down debts in a bankruptcy proceeding without the necessary approval of two-thirds of each class of creditors. Because, as noted in the preceeding [sic] paragraph, there was no reduction in the value of the collateral Valley held, the constitutional defects of *Security-First National Bank* and *Los Angeles Lumber Products* are not present here, and we find no reason to go beyond those cases to fashion a rule that would require reversal of the Reorganization Court's decision.[4] There is no Fifth

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[4]Valley's contention that the rules regarding burden of proof in the so-called "turnover" cases (*see, e.g., In re Penn Central Transportation Co.,* 494 F.2d 270 (3d Cir.), *cert. denied,* 419 U.S. 883 (1974): *In re Third Avenue Transit Corp.,* 198 F.2d 703 (2d Cir. 1952)) should apply is likewise unavailing. First, there has been no turnover to the debtor of assets held by the creditor as security; i.e., this is simply not a turnover case. Second, the factors which require that

(This footnote is continued on next page)

Amendment violation absent actual impairment of a creditor's security. *Matter of Chicago, Rock Island and Pacific Railroad Co.*, 545 F.2d 1087 (7th Cir. 1976). We therefore affirm as to Valley National Bank.

B. *Woolsey*

As a minority shareholder in the old Air California Corporation, Woolsey objected to his being required to relinquish his stock in that company as a result of the merger. It is his initial contention that the Reorganization Court's finding that the merger was fair, just and equitable was contrary to the evidence.[5] Specifically, he argues that the merger did not comply with certain California merger statutes and that the merger was inherently unfair.

As an initial proposition, we point out that, while the trustees had the burden of proving the merger fair, just and equitable to the satisfaction of the Reorganization Court, it is Woolsey's burden to show to this court that the finding is clearly erroneous. Rule 52(a), Fed. R. Civ. P. We are of the opinion that he has not met that burden.

The California merger statutes to which Woolsey refers are the former sections 4103 and 4107 of the Corporations Code and are quoted in full in the margin.[6] While there is some question as to whether this

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the debtor seeking to have assets serving as security for a loan returned to it should bear a high burden of proving the necessity of such a measure are not present here. A turnover of assets to a debtor appears to be the most drastic remedy allowed under Chapter X of the Bankruptcy Act. It is therefore proper that a party seeking such a remedy should have to meet a high burden of proof before it is allowed. Where, as here, the creditor's collateral is not as severely impaired—indeed, as noted above, it was not impaired at all—and the creditor's control over it is undiminished, it should not be necessary to impose such a burden. Without exploring all of Valley's arguments in favor of applying the turnover rules, or all of the trustees' arguments which show that it would be improper to do so, and that in any event they satisfied the rules, we find them to be inapplicable in this situation.

[5]The finding to which Woolsey objects reads as follows:

> "The Court also finds that implementation of the merger is fair, just and equitable to, and in the best interests of, Air California and its public shareholders, and that Westgate, the Trustees and Mr. James Leisner (who is both a Westgate and Air California director) have satisfied their fiduciary obligations to such shareholders."

Finding of Fact V., Record on Appeal at p. 2589.

[6]The merger statutes to which Woolsey refers are the former sections 4103 and 4107 of the California Corporations Code. They were repealed by Stats. 1975, c. 682, p. ....., § 6, eff. Jan. 1, 1977. Section 4013 (Stats. 1947, c. 1038, p. 2376, § 4103, *as amended* Stats. 1951, c. 1377, p. 3296, § 8 *and* Stats. 1970, c. 671, p. 1302, § 4, operative Jan. 1, 1971) reads as follows:

> "§ 4103. Directors' approval of agreement for merger or consolidation; contents of agreement
>
> "The board of directors of each corporation seeking to merge or consolidate shall, by resolution, approve the terms and conditions of the proposed agreement and the mode of carrying them into effect, as well as the manner and basis of converting the shares of the constituent corporations into shares or other securities of the consolidated or surviving corporation or of a holding corporation of any of the constituent corporations.
>
> "The agreement may provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares, to shareholders of the constituent corporations or any class of them; but upon such distribution of cash, property, or securities, the liabilities of the consolidated or surviving corporation, including those derived by it from the constituent corporations, plus the amount of the stated capital of the consolidated or surviving corporation, shall not exceed the value of the assets of the consolidated or surviving corporation."

Section 4107 (Stats. 1947, c. 1038, p. 2377, § 4107, *as amended* . . .) reads in pertinent part as follows:

> "§ 4107. Approval of shareholders; required vote; meeting; notice; statement of terms of agreement
>
> The agreement shall be approved by the vote * * * of the holders of not less than two-thirds of the issued and outstanding shares of each class, regardless of limitations or restrictions on the voting power thereof, of each corporation . . . ."

It is conceded by all parties to this appeal that these sections of the code were applicable at the time the merger was approved.

claimed error was properly preserved in the court below, there is enough ambiguity in the Record to allow us to assume that it was. Woolsey claims that the first paragraph of § 4103 was violated because the merger agreement did not give the "basis of converting the shares of the constituent corporations into shares or other securities" of the surviving corporation. Woolsey does not develop this argument, nor does he cite authority to support it. We find it sufficient to note that § 4103 did not require that the directors explain in the merger agreement the basis for the conversion of shares, but only that they approve such provisions. Furthermore, we have examined the Information Statement published in conjunction with the proposal for the merger and find that it adequately explained the conditions of the merger, including the basis for the potential conversion of Westgate certificates into Westgate stock.

Next Woolsey argues that the second paragraph of § 4103 was also violated because some shareholders of Air California became equity participants in the resulting corporation, while others were assured only of cash for their old Air California shares. In arguing that all the shareholders of a given class had to be treated equally in terms of the character of their distribution rights under a merger agreement, Woolsey is reading into § 4103 a requirement that simply did not exist. Neither can it be inferred from reading § 4103 in conjunction with § 4107, as Woolsey has attempted. Section 4107 merely required that any merger agreement—whatever its terms—be approved by two-thirds of the shareholders of each class of shares. No one contends that this was not done. Absent authority to the contrary, we conclude that it was not

improper to guarantee certain shareholders equity participation in the surviving corporation and to guarantee others only fair financial compensation for their shares. *See Giannini Controls Corp. v. Superior Court of Los Angeles Co.*, 240 C.A.2d 142, 49 Cal. Rptr. 643 (1966).

Woolsey alleges a further violation of § 4103 by claiming that Westgate was the surviving corporation and that it had no net worth at the time of the merger. He implies that this fact shows Westgate's liabilities exceeded its assets at the time of the merger, in violation of the second paragraph of § 4103. But it was Wacco—not Westgate—which survived Air California, and no one claims its liabilities exceeded its assets. We see no merit to this claimed error.

Next Woolsey contends that the merger plan was inherently unfair because it failed to guarantee him and other minority shareholders continuing equity participation in Air California. He cites no authority whatsoever in support of this argument. In view of the fact that the then-applicable California merger statutes (discussed *supra*) allowed distribution of cash in lieu of property or securities, there seems to be no support for this proposition.

We have examined Woolsey's other contentions regarding the fairness, justice and equity of the merger, and find they likewise have no merit. In large measure, they constitute attacks on the findings of the Reorganization Court. We have reviewed those findings and the evidence presented, and we conclude that the findings are supported by substantial evidence.

Woolsey's second major objection concerns the finding, quoted in footnote five in the margin, that the trustees of Westgate and the directors of Air California

had fulfilled their fiduciary obligations in bringing about the merger. Although the specific acts constituting the alleged breaches are not explained clearly in the briefs, it appears that the harm alleged to have resulted therefrom includes depriving minority shareholders of continuing equity participation in Air California, and a depressed valuation of Air California stock at the time the merger was approved and carried out.[7]

There is no breach of fiduciary duty owed by a director or majority shareholder to a minority shareholder in the merger context where the action is taken in good faith and is inherently fair to the minority. It is the law in California that requirements of good faith and inherent fairness are met when (1) the merger transaction has independent legitimate business reasons and benefits the corporation, and (2) the minority shareholders are treated fairly and without disadvantage. *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969). *Accord, Fisher v. Pennsylvania Life Co.*, 69 Cal. App. 3d 506 (1977). *See In re Security Finance Co.*, 49 Cal. 2d 370 (1957).

With regard to the first requirement, we have examined the record and find that the business reasons given for the merger are supported by the evidence. The Reorganization Court was justified in finding that Air California would benefit from being relieved of

[7]As noted earlier, Air California stock was exchanged for so-called Westgate certificates which could be redeemed for $15 each or held and exchanged for Westgate stock upon reorganization of that company. All evidence, including testimony of adverse witnesses, presented to the Reorganization Court pointed to the fact that Air California had a value of less than $15, a fact which Woolsey does not seriously dispute. His contention seems to be that certain acts by the trustees and directors of Westgate and Air California caused Air California to loose [sic] value prior to the merger.

the reporting requirements imposed on public corporations by federal securities law, that it would have greater access to equity capital after Westgate's reorganization, that potential conflicts of interest between Westgate and Air California would be eliminated, and that Air California could then make greater use of Westgate management skills in its operations. The Reorganization Court was likewise justified in finding that Westgate would benefit from the merger by making successful reorganization in the Chapter X proceedings more likely. Woolsey has advanced no persuasive reasons for disregarding these findings, and we therefore decline to do so.

Regarding the second requirement—no disadvantage to minority shareholders—our discussion of the fairness, justice and equity of the merger applies here as well. We state once again that we have found no statute or case which guarantees minority shareholders an equity participation in a merged corporation. We also note that witnesses for the trustees and witnesses otherwise adverse to the trustees all agreed that $15 was a fair price paid for the Westgate certificates as representing the value of the old Air California shares. Independent expert appraisers valued Air California shares at around $12.50 per share during this time period. In addition, those former Air California shareholders who wished to remain equity participants rather than cash out were allowed to retain their Westgate certificates and exchange them for Westgate stock if and when Westgate was reorganized. Finally, all minority shareholders had the option of exercising their appraisal rights. Having carefully considered the options available to minority shareholders, we are left with the impression that they were treated fairly and suffered no disadvantage in the merger.

To the extent Woolsey argues that the trustees and directors somehow conspired to reduce the value of Air California in order to spring the merger when the company's value was low and thus minimize their obligations to the minority shareholders, we reject that argument as being without any foundation in the Record. We will not consider such charges without their having first been considered by a trier of fact. We have also examined other issues raised by Woolsey and find no merit to them.

C. *The Ashes*

The focus of the Ashes' appeal is on the Information Statement which announced the proposed merger. The Ashes claim that certain necessary information was not adequately disclosed, and that other necessary information was undisclosed, all in violation of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. § 78n.[8] Specifically, they claim that the Information Statement did not clearly reveal that the Westgate trustees—Messrs. Trone and Kunzel—were also directors of Air California and that because they were financially compensated for their work as trustees, their voting in the merger proposal as directors represented a potential conflict of interest which required exposure.

[8]Regulations promulgated pursuant to Section 14(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(c), require the publication and distribution of an information statement announcing and explaining the merger proposal to all shareholders eligible to vote. 17 C.F.R. § 240.14c. Under those regulations, "[n]o information statement shall contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the same meeting or subject matter which has become false or misleading." 17 C.F.R. § 240.14c-6.

The Ashes also claim that there was inadequate disclosure of the fact that Mr. Leisner was a director of both Air California and Westgate and could likewise be suspected of conflict of interest. They also point out (correctly) that six months before the merger announcement, the trustees had been authorized to sell Air California shares for $21, but that this fact was not disclosed in the Information Statement. Finally, they note that the Information Statement failed to disclose that large numbers of the Air California shares owned by Westgate were subject to promotional conditions which arguably reduced the value of all of the shares.

As to the Ashes' first claimed error—inadequate disclosure of conflicting interests among the directors and trustees—it should be noted that no one contends the information was undisclosed in the statement or that it was improper for the persons involved to occupy positions in both Westgate and Air California. The sole claim is that the information was "buried" in the information statement and thus did not give adequate notice of potential conflicts. We disagree.

The fact of the dual roles played by Messrs. Trone and Kunzel is revealed in three different places in the Information Statement. Mr. Leisner's positions are disclosed once. In all instances, the text is preceeded [sic] by a headline in boldface type which alerts the reasonable reader to the nature of the disclosure to follow. The type in all instances is of the size and just as prominent as that used throughout the Information Statement. We think the information was adequately disclosed in terms of how it was presented in the Statement. *See Kohn v. American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir. 1972) (the "equal promi-

nence" rule). Furthermore, the locations of the disclosures—on pages 19, 27 and 28 of the Information Statement—offer no compelling grounds for reversal. The Ashes may wish to have seen the potential conflicts appear in the Statement before the directors' endorsement of the merger, but they cite no authority which would require this textual organization. As it is, the disclosures are well toward the front of the Statement, though not as near the front as the endorsement. "[E]very fact cannot be contained in the beginning." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 602 (3d Cir. 1974).

Next, the Ashes claim it was wrong not to disclose in the Statement the fact that up until six months before the merger proposal was announced, the trustees had authority to sell Air California shares at $21 each. This earlier asking price was determined under special circumstances largely irrelevant to this case, resulted in few if any shares being sold at that price, was terminated, as noted, six months before the merger was proposed, and was material only to the extent it affected the minority shareholders' decision to exercise their appraisal rights rather than retain the Westgate certificates or cash out. No one now claims that the $21 price in fact represented the value of Air California shares at the time of the merger. Furthermore, "Air California unilaterally extended renewed appraisal rights to all Air California shareholders after all relevant information [including this old $21 asking price] became known." Conclusion of Law VI, Record at p. 2601. In light of the foregoing we conclude that this claimed error has no merit.

For similar reasons, the Ashes' third claimed error—failure to disclose promotional conditions attached to

some of the Air California shares owned by Westgate—must also be rejected. The Reorganization Court found that neither Air California nor the trustees of Westgate were aware of the relevance of the conditions until after the merger had been announced. It also found that whatever defects of disclosure resulted were cured by a Supplemental Notice published before the merger was consummated. It is also important to note that, in conjunction with the disclosure of the promotional conditions, Air California consented to increase the redemption amount from $13 to $15, apparently to avoid litigation on the significance of the effect of the promotional conditions on the value of the rest of the shares. We agree with the Reorganization Court that whatever inadequacies existed in the Information Statement as a result of the failure to disclose the promotional conditions were cured by subsequent disclosure and the increase in the redemption figure.

We have examined other related issues raised by the Ashes and find them to lack sufficient merit to warrant discussion or reversal.

D. *Mootness*

To the extent all three appellants seek an equitable remedy in the form of a negation of the merger, there is an additional reason for finding against them; the remedy they seek is not available because of mootness. The merger took place on October 12, 1977. All Air California public shares were redeemed or exchanged for Westgate certificates. The vast majority of persons who were affected by that action are not subject to the jurisdiction of either this court or the Reorganization Court. Only Woolsey and the Ashes remain of the former shareholders. The merged company, Wacco/Air California, has been operating for over two years as

a wholly-owned subsidiary of Westgate. All of these facts make it difficult, if not impossible, to fashion an equitable remedy that would restore appellants to their former positions. *See Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977).

In addition, at least two of the three appellants—Woolsey and the Ashes—would not be entitled to equitable relief even if it were available. Neither of them sought any kind of stay of the order in which the Reorganization Court authorized the merger. This court stated in *Matter of Combined Metals, supra*:

> "the practical necessities involved in a successful reorganization require that unless an order of the bankruptcy judge or the district judge is stayed pending appeal, the trustee's acts in accordance with the order should not thereafter be subject to reversal, even if the order is subsequently overturned on appeal."

557 F.2d at 189. *See In re Abington Realty Corp.*, 530 F.2d 588 (4th Cir. 1976). This failure to obtain, or even seek, a stay effectively precludes Woolsey and the Ashes from the equitable remedy they ask for; absent a stay, it was entirely proper for the trustees to go ahead with the merger. The actions they took pursuant to that order should not be reversed.

The foregoing brief analysis may also apply to Valley. It did, in fact, seek a stay, but was refused by the Reorganization Court. It also sought a stay from this court, but was refused again. Significantly, no stay was sought from the Circuit Justice. Rule 51, Supreme Court Rules. The facts also show that Valley was quite relaxed in its attempts to block or delay the merger. Indeed, for a time, Valley actively supported

the proposed merger. And even after it changed its position, it made no effort to seek a stay until shortly before the merger was consummated, even though it knew well in advance that the merger was being planned and pursued by the trustees. The cumulative impact of these facts suggests to us that Valley's position is not much better than that of Woolsey and the Ashes in terms of its claim to equitable relief.

Ordinarily, if the merger cannot be attacked because of mootness, the order on appeal would be dismissal, not affirmance of the judgment below. However, in the first portion of our opinion (Part II; A, B and C) we hold the judgment should be affirmed on the merits. Accordingly, we permit the first portion of our opinion to govern our order on appeal.

The judgment is AFFIRMED as to the three appellants.

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc.

United States Court of Appeals, for the Ninth Circuit.

The Valley National Bank of Arizona, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3388.

Roy B. Woolsey, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 78-1227.

C. Neil & Elaine T. Ash, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3662.

Filed: Aug. 6, 1979.

Before: CARTER and ANDERSON, CJJ, and *TAKASUGI, DJ.

The panel in the above entitled matter voted unanimously to deny the petition for rehearing of ROY B. WOOLSEY, C. NEIL ASH and ELAINE T. ASH.

The same above named appellants had suggested the appropriateness of a rehearing en banc. Judge Anderson voted to reject the suggestion; Judge Carter and Judge Takasugi recommended the rejection of such a suggestion.

The petition for rehearing and suggestion for rehearing en banc having been circulated to all of the active judges, and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected as to the appellants WOOLSEY and ASH herein.

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*Hon. Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

The Opinion of the Reorganization Court.[1]
(Except Exhibits)

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In Proceedings for the Reorganization of a Corporation.

In re Westgate-California Corporation, a Nevada corporation, Debtor. 74-413.

In re Wescal Properties, Inc., a California corporation, Debtor. 74-414.

In re Tri-County Ranches, Inc., a California corporation, Debtor. 74-1079.

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[1]The name "Wyman, Bautzer, Rothman & Kuchel" and its address and telephone number appear in the left margin of each page except page 1 where they appear at the top. The Findings, Conclusions and Order, excluding the Exhibits, appeared as pp. 336 to 360 (Appeal 77-3662), pp. 384 to 408 (Appeal 78-1227) and pp. 2579 to 2603 (Appeal 79-3388).

In re West Coast Properties, Inc., a California corporation, Debtor. 74-2271.

Filed: Oct. 12, 1977.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE TRUSTEES' APPLICATION FOR AUTHORIZATION TO EFFECT A MERGER WITH AIR CALIFORNIA

At San Diego, in said district, on the 12th day October, 1977.

This matter first came on to be heard before the Honorable Leland C. Nielsen, United States District Judge, in his courtroom, 940 Front Street, Courtroom 5, San Diego, California 92101, on the 14th day of January 1977, at 9:00 A.M., upon the "Application for Authorization to Effect a Merger with Air California" ("Application") of Curvin J. Trone, Jr. and Herbert Kunzel, Trustee and Additional Trustee, respectively ("Trustees"), of the above denominated debtor estates, pursuant to notice thereof to the above named debtors, their creditors, stockholders, debenture-holders, indenture trustees, the Securities and Exchange Commission and other parties in interest, and to all shareholders of Air California, given in accordance with this Court's Order of November 29, 1976.

The following parties appeared at the aforesaid hearing:

Frank Rothman, Esq., Alan D. Croll, Esq. and Gary N. Jacobs, Esq. of Wyman, Bautzer, Rothman & Kuchel, counsel for the Trustees; Herman L. Glatt, Esq. of Stutman, Treister & Glatt, professional corporation, special counsel for the Trustees; Allen F. Corotto,

Esq., for the Securities and Exchange Commission; John H. Sharer, Esq. and Charles D. Axelrod, Esq. of Gibson, Dunn & Crutcher, counsel for Valley National Bank in its capacity as alleged creditor of Westgate-California Corporation ("Westgate"); Frederick K. Steiner, Esq. of Snell & Wilner, counsel for Valley National Bank in its capacity as Indenture Trustee for Westgate's 6% Subordinated Debentures; Anthonie M. Voogd, Esq. of Lawler, Felix & Hall, counsel for Bank of California as Indenture Trustee for Westgate's 6½% Subordinated Convertible Debentures; Everett M. Clayton, III, Esq. of Latham & Watkins, special counsel for Air California; Boris Lakusta, Esq. of Graham & James, counsel for Air California; Nathan Lane, III, Esq. of Hawkins, Cooper & Pecherer, counsel for Clifford E. Nelson, an Air California shareholder; Roy B. Woolsey, Esq. of Woolsey, Angelo and Thatcher, an Air California shareholder appearing pro se; and C. Neil Ash, Esq., an Air California shareholder appearing pro se.

In conjunction with the January 14, 1977 hearing, the Court received and reviewed numerous pleadings and related documents, including the following: the Application and exhibits thereto; written objections, statements, memoranda and correspondence filed by Valley National Bank (in its capacity as alleged creditor), C. Neil and Elaine T. Ash, Clifford E. Nelson, Roy B. and Louise J. Woolsey, Austin C. Beutel, and Richard A. Norton; and the Trustees' Memorandum of Points and Authorities in Reply to Objections to the Application.

In the course of the January 14 hearing, the Court heard the statements of counsel and the testimony of

Messrs. Herbert Kunzel, Roger Miller, Robert W. Clifford, Ross J. Cadenasso and William K. Bowes, Jr.

Because of certain unresolved issues concerning the merger which were pending before the Department of Corporations of the State of California (the "Department"), the Court continued the hearing, with subsequent continuances to June 7, 1977.

On February 1, 1977, a "Motion for Summary Judgment in Favor of C. Neil Ash and Elaine T. Ash, Objectors to Application for Authorization to Effect a Merger with Air California" was filed, together with an affidavit and Memorandum of Points and Authorities in support thereof. On February 4, 1977 Points and Authorities in opposition to the merger were filed on behalf of Roy B. and Louise J. Woolsey. On February 9 the Trustees and Air California filed memoranda in opposition to the motion for summary judgment. On February 14, 1977 the Court heard argument on the motion and denied the motion after concluding that "there were no material misstatements or failures to state and that all material things were properly stated in the [I]nformation [S]tatement." (Reporter's transcript of proceedings, February 14, 1977, p. 35.)

On May 23, 1977, a "Notice of Further Hearing on Application to Effect a Merger with Air California and Certain Matters in Connection Therewith" ("Supplemental Notice") was mailed, pursuant to prior order of this Court, to the Debtors' creditors, stockholders, debentureholders, indenture trustees and other parties in interest, to all Air California shareholders and to the SEC.

On June 7, 1977 the hearing on the Application was continued to July 19, 1977, because the Department

had not as yet acted upon the Trustees' Application for Removal of Conditions on Promotional Shares of Air California. In the first week of July, 1977, the Trustees and Valley National Bank agreed that the Trustees would request a continuance of the July 19 hearing. The Trustees requested such continuance to afford Valley National Bank an opportunity to take certain depositions with respect to the Application (which depositions have been taken) and because, at the time of such agreement, the Department had not yet rendered its decision on the Trustees' Application for Removal of Conditions on Promotional Shares of Air California, and there was no assurance that such decision would be available prior to the July 19 hearing or in time to afford the interested parties an adequate opportunity to review said decision. On July 13, 1977, the Court entered its order continuing the hearing to October 4, 1977.

On July 6, 1977 (subsequent to the Trustees' agreement with Valley National Bank), the Commissioner of Corporations of the State of California handed down the "Commissioner's Findings of Fact, Conclusions and Final Decision" (the "Decision"), and on August 1, 1977 the Department issued its "Order Removing Conditions" with respect to the promotional conditions imposed on certain shares of Air California. Said Order is itself based upon the satisfaction of certain conditions (which are set forth in full therein).

At the continued hearing, held on the 4th day of October, 1977, the following parties appeared: Frank Rothman, Esq., Alan D. Croll, Esq., and Gary N. Jacobs, Esq. of Wyman, Bautzer, Rothman & Kuchel, counsel for the Trustees; Herman L. Glatt, Esq. of

Stutman, Treister & Glatt, professional corporation, special counsel for the Trustees; Everett M. Clayton, III, Esq. and Fred H. Cohen, Esq. of Latham & Watkins, special counsel for Air California; Boris Lakusta, Esq. of Graham & James, counsel for Air California; Dean Stern, Esq. of Gibson, Dunn & Crutcher, counsel for Valley National Bank in its capacity as alleged creditor of Westgate; Nathan Lane, III, Esq. of Hawkins, Cooper & Pecherer, counsel for Clifford E. Nelson; an Air California shareholder; and Roy B. Woolsey, Esq. of Woolsey, Angelo and Thatcher, an Air California shareholder appearing pro se.

Further pleadings and related documents were received and reviewed by the Court, including the following documents filed in connection with the June 7 hearing: the Trustees' Memorandum of Points and Authorities in Response to Written Objections of Valley National Bank of Arizona Filed in Opposition to the Application for Authorization to Effect a Merger with Air California; the further written objections, statements, memoranda and correspondence in opposition to the merger filed by or on behalf of Joseph Elsant, Roy B. and Louise J. Woolsey, Howard S. Martin, Austin C. Beutel, C. Neil and Elaine T. Ash, Clifford E. Nelson and Valley National Bank (in its capacity as alleged creditor). The Bank of California, Trustee for Westgate's 6½% subordinated convertible debentures due 1987, and William Ball, Successor Trustee to Valley National Bank as Trustee for Westgate's 6% subordinated debentures due 1979, have both filed statements in support of the Trustees' Application. In connection with the October 4, 1977 hearing, the Court has received and reviewed (and has taken judicial notice of the exhibits thereto) further pleadings and

related documents, including the following: the Trustees' Supplemental Application Seeking Authorization to Effect a Merger with Air California ("Supplemental Application"); the Trustees' Supplemental Memorandum of Points and Authorities in connection with Application to Effect a Merger with Air California; written objections, statements, memoranda and correspondence in opposition to the merger filed by or on behalf of Roy B. and Louise J. Woolsey, Kenneth and Grayce Clissett and Clifford E. Nelson.

At the continued hearing, the Court heard the further statements of counsel, the statement of William Ball, successor Trustee to Valley National Bank as Trustee for Westgate's 6% subordinated debenture due 1979, and the testimony of the following witnesses: Ross J. Cadenasso, Herbert Kunzel, William K. Bowes, Jr., Walter Lambert and Claire V. Hansen. In the course of the continued hearing, the Court received into evidence various correspondence, documents and, with respect to Valley National Bank and Westgate, deposition transcripts.

Based upon all of the foregoing proceedings, and good cause appearing, and the Court having concluded that Judgment, consisting of these Findings of Fact, Conclusions of Law and Order ought to be signed and entered without delay.

Now, therefore, this Court makes its Judgment, consisting of its Findings of Fact, Conclusions of Law, and Order as follows:

FINDINGS OF FACT

I

The transaction described in the Application and Supplemental Application involves the merger of Air California into Westgate-Wacco, Inc. ("Wacco"), a wholly-owned subsidiary of Westgate-California Corporation ("Westgate"). The merger and these Findings of Fact, Conclusions of Law and Order will result in the shareholders of Air California, other than Westgate [for purposes of these Findings of Fact, Westgate shall include: West Coast Properties, Inc. ("West Coast") and Tri-County Ranches, Inc. ("Tri-County")], receiving in exchange for their Air California stock, Westgate Common Equivalent Certificates ("Westgate Certificates") having an aggregate face amount equal to Fifteen Dollars ($15.00) per share of Air California stock so exchanged. The specific terms and conditions of the merger, including the rights of redemption of holders of Westgate Certificates and the Redemption Fund to be established in connection therewith, are set forth in detail in the Information Statement relating to the merger heretofore filed with this Court.

II

The merger contemplates an exchange rate of not less than $13.00 perincipal amount of Westgate Certificate for each share of Air California stock so exchanged, and the merger agreements specifically contemplate that such exchange rate could be increased if this Court deemed it appropriate to do so. As a result of the above-described proceedings before the Department, the Trustess have recommended that the exchange rate be augmented by $2.00 per share to a total "exchange" rate of $15.00 per share. Such

augmentation was proposed as the result of the Trustees' recomputation of the exchange rate after excluding all "promotional" shares of Air California owned by Westgate (121,427 out of 722,975 so owned) from any participation in any "distribution" of assets deemed effected as consequence of the merger. The Trustees, in recommending the augmentation of the exchange rate, do not concede that the merger should be deemed to constitute a distribution of assets (and in fact dispute such contention), and the Court does not find it necessary to make a determination of that issue. The Trustees and Air California became aware that the Department did so view the merger after the mailing of the Information Statement and the holding of the Special Meeting of Air California's stockholders. In the course of the proceedings before the Department seeking a resolution of the issue, the Trustees committed to recommend to this Court that the exchange rate be augmented by $2.00 per share to an aggregate exchange rate of $15.00 per share, in order to exclude the promotional shares from any participation in any "distribution", thus rendering the Department's promotional conditions inapplicable to the merger. The Trustees' proposal was made in order to avoid the delay and expense of litigating these issues before the Department and the courts. The Decision and Order Removing Conditions, while premised upon reasoning different from that proferred by the Trustees, granted relief consistent with that requested by the Trustees. Since it is the Court's finding (see *infra*) that the merger, after giving effect to the $2.00 per share augmentation, is of significant benefit to the Debtors' and their contemplated reorganization, the Trustees' recommendation on this point will be, and is hereby, accepted.

III

Completion of the merger in accordance with its terms, as supplemented by the $2.00 per share augmentation, will advance the reorganization of the above-named Debtors in the following principal respects:

A. Effecting the merger will, predicated on presently existing conditions, have the effect of increasing Westgate's Reorganization Value by not less than $1,900,000 after taking into account the costs related to the merger. Such increase in Reorganization Value is desirable in that it enhances the possibility that Westgate's junior classes of creditors and security holders (or certain of them) may participate in the reorganized Westgate;

B. The ability to draw upon cash not needed in Air California's operations, under the supervision of this Court and consistent with contractual limitations applicable to Air California, without taking into account any minority interests in Air California, which would be one result of the merger, could be a significant factor in facilitating the reorganization by, among other things, assisting the settlement of claims and pursuit of litigation, and providing for costs incident to the reorganization.

C. Since the merger is beneficial to Air California (see paragraph IV, *infra*), Westgate, as Air California's parent, is also benefitted thereby.

For the foregoing reasons, the Court finds that implementation of the merger is in the best interests of Westgate, Wescal, Tri-County and their respective creditors and other parties in interest.

IV

Implementation of the merger will benefit Air California in the following principal respects:

A. Air California presently has the burdens, without the most significant benefits, of being a publicly owned company. Substantial management time is expended and significant costs are incurred by Air California because it is publicly held, including legal and accounting fees incurred in connection with its compliance with the reporting requirements of the Securities and Exchange Act of 1934. Because Westgate maintains its consolidated ownership of Air California in excess of 80% in order to maintain a mutually advantageous tax consolidation with Air California for federal income tax purposes, there does not exist a broadly based public market for Air California securities. Since Westgate has indicated that it has no present intention of selling its Air California shares, and since both Air California and Westgate do not intend to jeopardize the aforementioned tax benefits through a dilutive equity offering by Air California, these problems can be expected to continue unless the proposed merger is consummated. After the merger, the direct expenses and management effort involved in producing and distributing public reports in accordance with the federal securities laws would be reduced; Air California's only securities reporting requirements would be as a member of the Westgate group, the members of which would share expenses for such reports on an allocated basis. Air California's direct cost savings may be as much as Seventy Five Thousand Dollars ($75,000) per year. It is anticipated that Air California will have significant capital requirements over the long-term. In the event Westgate is reorganized as a publicly held company,

Air California, as a wholly owned Westgate subsidiary, should have greater access than at present to outside equity capital which is expected to be available to Westgate upon its reorganization, thereby reducing Air California's dependence upon financing through debt or debt equivalents.

B. Complete consolidation of Air California with Westgate would remove presently existing potential conflicts of interest which inhibit the flow of resources between Air California and Westgate. These potential conflicts arise because of the respective fiduciary obligations of Air California's management to its shareholders and that of the Trustees to the parties in interest to these proceedings. Upon removal of such conflicts by the merger, it is possible that cash not needed in Air California's operation may be utilized, subject to the supervision of this Court and consistent with contractual limitations applicable to Air California, to facilitate Westgate's reorganization. However, if Westgate is successfully reorganized as a viable and operating entity, it is anticipated that Westgate will have significant resources which would be available to Air California. The air transportation industry is subject to external pressures which create volatility in trafic, costs and revenue, and the availability of such additional resources, free of inhibitions on their flow imposed by minority ownership, might better enable Air California to cope with the adverse effects of such pressures. These potential benefits to Air California will be significant only if Westgate is successfully reorganized.

C. The merger will make a broader range of management skills available to Air California. Full utilization by Air California of existing Westgate management

experience is probably not possible without full Westgate ownership because of the above referenced potential conflicts of interest.

For the foregoing reasons the Court finds implementation of the merger to be in the best interests of Air California.

V

The Court also finds that implementation of the merger is fair, just and equitable to, and in the best interests of, Air California and its public shareholders, and that Westgate, the Trustees and Mr. James Leisner (who is both a Westgate and Air California director) have satisfied their fiduciary obligations to such shareholders. The Court bases its findings upon the following factors:

A. Upon the consummation of the merger, holders of Air California stock will be entitled to receive Westgate Certificates in proportion to their ownership of Air California stock. The Westgate Certificates will be automatically converted into common stock of Westgate upon final confirmation of a plan of reorganization for Westgate providing for the issuance of common stock. Such common stock will have a Reorganization Value equal to the face amount of the converted Westgate Certificates. The Westgate Certificates (or the common stock of Westgate into which they are converted) will be redeemable for cash in the amount of the face value of the Westgate Certificates, at the option of the holder, at any time from the effective date of the merger until 180 days after Westgate common stock is mailed to Westgate Certificate holders. Westgate will create a Redemption Fund at the time of the merger in an aggregate amount equal to the

total face amount of Westgate Certificates issued in connection with the merger. The Fund will be held and administered by an independent trustee and will not be subject to the claims of creditors of Westgate. The redemption feature of the Westgate Certificates will provide an opportunity for shareholders wishing to do so to receive cash immediately. Because the cash for redemption will be set aside in a segregated Redemption Fund, the redemption decision by each recipient of Westgate Certificates may be postponed until it is known whether and on what terms Westgate will be reorganized and whether, and at what prices, there will be a public market for Westgate's common stock. Holders of Westgate Certificates will be entitled to receive their pro rata share of income earned by the Redemption Fund after allowance for their allocated share of expenses of the Fund. Accordingly, the terms of the Westgate Certificate provide for the holders of Air California stock a flexible instrument which will enable them, at their option, to remain equity participants in the reorganized Westgate (assuming a plan is adopted which provides for the issuance of common stock) or to receive cash for their holdings.

B. The merger agreements provide for an exchange rate of Thirteen Dollars ($13.00) per share, which will be increased by an additional Two Dollars ($2.00) per share. The net result is that Air California's shareholders, other than Westgate, will receive a total of Fifteen Dollars ($15.00) face amount of Westgate Certificates in exchange for each share of Air California stock held by such shareholders. The Court has heard substantial testimony on the value to be ascribed to each publicly held share of Air California stock, including testimony by independent appraisers engaged by

Air California and Westgate for the purpose of establishing such a value; based upon such testimony, the Court finds that as of November 1, 1976 the fair value of the publicly held shares of Air Calfornia was $12.50 per share and that at the present time the fair value of such shares does not exceed $12.50 per share (without taking into account the effect, if any, on valuation by reason of 121,427 shares owned by Westgate which may be subject to promotional conditions). The agreements relating to the merger provide that Air California shareholders will receive a premium over and above the appraised value for Air California shares set by the independent appraisers and such exchange rate is substantially higher than the trading prices for Air California stock prior to the first public announcement of the merger. The Court also notes, without finding it necessary to pass upon the issue, that if the position of the Department is correct with respect to the merger constituting a distribution of assets, the $2.00 augmentation of the exchange rate adequately takes such promotional conditions into account in accordance with the Department's Decision; if, on the other hand, the Trustees are correct, Air California's public shareholders will, by the $2.00 increase of the exchange rate, receive a further premium for their shares. The Court therefore finds that the aggregate exchange rate, constitutes fair, just and equitable consideration for the non-Westgate holders of Air California stock.

Since the Court finds that the exchange rate proposed in the merger, as supplemented, is fair, just and equitable to the Air California shareholders and that the terms and conditions of the Westgate Certificates provide significant benefits to such holders, the Court

finds that the Agreement and Plan of Reorganization, the Agreement of Merger and the Westgate Certificates, as described in the Information Statement, are fair, just and equitable to all persons affected by the merger, including Air California and its public shareholders.

VI

The Westgate Certificates to be issued in exchange for Air California stock owned by shareholders other than Westgate (including the aggregate exchange rate) are fair, just and equitable to all persons affected by the proposed merger, including Air California and its public shareholders and satisfy the requirements for exemption from registration under Section 3(a)(10) of the Securities and Exchange Act and within the meaning of the California Corporate Securities Law and Rule 260.103(b) promulgated thereunder.

VII

This Court is, in the instant case, an appropriate Court of competent jurisdiction empowered to issue the necessary decree or order as contemplated by the California Corporate Securities Law and Rule 260.103 (b) promulgated thereunder and this is a proceeding of the type described in such Rule. The Westgate Certificates (and the Westgate common stock into which the Westgate Certificates will be converted if the Trustees' Plan of Reorganization is approved by this Court) are being issued under or pursuant to a Plan of Reorganization (in which Plan the merger of Air California into Wacco is an integral initial portion) which Plan, pursuant to the provisions of the National Bankruptcy Act, is subject to confirmation by this Court.

VIII

The merger agreements relating to the merger contemplate, as indicated above, the establishment of a Redemption Fund, which is to provide a source of payment to those Air California shareholders who elect to exercise their option to redeem their Westgate Certificates for cash. Upon establishment of such Fund pursuant to order of this Court, the Redemption Fund will be free and clear of all claims except those of the beneficiaries thereof in accordance therewith.

IX

Pursuant to the agreements relating to the merger, West Coast has agreed to transfer to Westgate all of its right, title and interest in and to the 691,279 shares of Air California's common stock of which it is the beneficial owner, such transfer to be subject to the rights of West Coast's creditors. Tri-County has undertaken to transfer to Westgate all of its right, title and interest in and to the 31,696 shares of Air California's common stock of which it is the record and beneficial owner, such transfer to be subject to the rights of Tri-County's creditors. Such transfers will be reflected in the inter-company accounts of Westgate, West Coast and Tri-County, and the principal consequence of such transfers will be to make Air California a first tier subsidiary of Westgate. The above described transfers to Westgate by West Coast and Tri-County, subject to preservation of the rights of West Coast's and Tri-County's creditors in accordance wih this Court's order, are proper and appropriate in facilitation of the merger and in simplification of Westgate's corporate structure.

X

Under the proposed merger, Wacco will be the surviving corporation and would change its name to Air California. Valley National Bank of Phoenix, Arizona ("Valley") has filed a claim against Westgate in its reorganization proceedings, and in connection with such claim asserts that the debt allegedly owing to it by Westgate is secured by the pledge of 691,279 shares of Air California stock (which constitutes approximately 77.8% of the outstanding stock of Air California). As a result of the merger, the existence of the allegedly pledged shares will cease. The merger agreements contemplate that Westgate will deposit with Valley an appropriate number of Wacco shares to be held by Valley as security for Valley's claim, subject to preservation in full of the rights, if any, of the various parties to these proceedings to challenge Valley's claim, including, Valley's claimed status as a secured creditor. Valley opposes the merger, and particularly the pledge of the Wacco shares in lieu of the Air California shares it presently holds. The Court finds that Wacco will be, for all intents and purposes, identical to Air California, subject to all contractual limitations presently applicable to Air California which limit its capacity to advance funds to Westgate. The Court further finds that notwithstanding the absence of a public market for Wacco stock, the economic value of the Wacco shares proposed to be pledged to Valley is at least equivalent to the value of the collateral heretofore held by Valley. By reason of the fact that none of the pledged Wacco shares will have promotional conditions affixed thereto, while a significant number of the Air California shares held by Valley do have such conditions (the Department's actions removing

such conditions is contingent upon the consummation of the merger), and by reason of the fact that as a consequence of the merger Air California will receive additional equity capital through the exercise of stock options, the Court finds that the value of the pledged Wacco shares is substantially in excess of the value of the pledged Air California shares. Furthermore and in any event, the value of the proposed collateral is substantially in excess of the maximum amount of Valley's claim. In light of the substantial identity of Wacco, after the merger, with Air California, prior to the merger, the Court finds that the merger, taken as a whole, does not effect a substitution of Valley's collateral, but in the event it is so considered, this Court has the jurisdiction, authority and ample grounds to compel such substitution. The Court further finds that this is a proper proceeding in which to authorize the merger and the pledge of Wacco shares to Valley and that Valley has had, in this proceeding, ample opportunity to present its position with respect to the merger and pledge, and, in fact, has done so. Accordingly, the Court finds that Valley's interests will be adequately protected by the pledge of the above-referenced Wacco shares in accordance with the order of this Court, and Valley's objections to the merger are denied.

XI

In connection with providing funds for the Redemption Fund, the Trustees have indicated that they propose to disburse $1,017,785 from Wescal (which entity does not have consequential bankruptcy claims against it other than those duplicative of claims against Westgate), which funds are presently invested in certificates of deposit. To the extent that Wescal will be

making such payments, the Trustees have indicated that the inter-company accounts will appropriately reflect Westgate's obligation to reimburse Wescal for the funds so advanced and that they will execute a Trustees' Certificate in confirmation thereof. The Court finds that the use of the funds of Wescal for purposes of contributing to the Redemption Fund is appropriate and in furtherance of the merger, and when made in accordance with the order of this Court and upon the execution of such Trustees' Certificate, will adequately protect the rights of creditors of Wescal.

XII

The Trustees have further advised the Court that they have arranged for a loan, subject to this Court's approval, from United California Bank ("UCB") pursuant to which UCB will loan Westgate, on a short-term basis, the remaining funds needed for the Redemption Fund. Such borrowing is to be reflected by a Trustees' Certificate. The Court, having reviewed the terms of the loan and the form of Trustees' Certificate, finds that this borrowing for the purpose of implementing the merger is appropriate and should be, and hereby is, approved.

XIII

If the merger is consummated in accordance with the provisions of these Findings of Fact, Conclusions of Law and Order, the conditions set forth in the Department's Order Removing Conditions will have been satisfied.

XIV

In entering the foregoing Findings of Fact, the Court has reviewed the record in these proceedings including without limitation the documentary evidence and testi-

mony (including the testimony of expert witnesses), and the Court has taken note of the credibility, independence and demeanor of the witnesses.

XV

To the extent appropriate, the foregoing Findings of Fact shall be deemed to be Conclusions of Law.

CONCLUSIONS OF LAW

I

The Agreement and Plan of Reorganization, Agreement of Merger, Redemption Fund Agreement and issuance of Westgate Certificates (including specifically the aggregate $15.00 exchange rate) are fair, just and equitable to, and in the best interests of, the above-named debtor estates and their respective parties in interest, Air California and Air California's shareholders.

II

The proposed transfer to Westgate of West Coast's and Tri-County's interest in and to the Air California shares in furtherance of the merger and simplification of Westgate's corporate structure, subject to preservation in full, in accordance with th is Court's order, of all rights of West Coast's and Tri-County's creditors whether secured or unsecured, is in the best interests of these debtor estates and their respective parties in interest, and adequately protects the interests of West Coast's and Tri-County's creditors.

III

The proposed pledge to Valley of a portion of Wacco shares of a value equal to or greater than the collateral formerly held by Valley, subject to preser-

vation of all rights of Valley, the Debtors and of other parties to these proceedings with respect to Valley's claim, in accordance with this Court's order, is proper and adequately protects the interests of Valley. This is a proper proceeding in which to authorize the merger and the pledge of a portion of the Wacco shares to Valley, and Valley has had in this proceeding, ample opportunity to present its position with respect to the merger and pledge, and, in fact, has done so.

IV

The terms and conditions of the merger and the Westgate Certificates proposed to be issued in exchange for Air California stock pursuant to the merger (including the exchange rate) are fair, just and equitable to all persons affected by the proposed merger, including Air California and its public shareholders and satisfy the requirements for exemption from registration under Section 3(a)(10) of the Securities Act of 1933 and within the meaning of the California Corporate Securities Law and Rule 260.103(b) thereunder.

V

This Court is, in the instant case, an appropriate court of competent jurisdiction empowered to issue the necessary decree or order as contemplated by the California Corporate Securities Law and Rule 260.103(b) promulgated thereunder and this is a proceeding of the type described in such Rule. The Westgate Certificates (and the Westgate common stock into which the Westgate Certificates will be converted if the Trustees' Plan of Reorganization is approved by this Court) are being issued under or pursuant to a Plan of Reorganization (in which Plan the merger

of Air California into Wacco is an integral initial portion) which Plan, pursuant to the National Bankruptcy Act, is subject to confirmation by this Court.

VI

The Air California Information Statement and the initial Application did not disclose the existence of the promotional conditions on 121,427 shares of Air California stock owned by Westgate. However, the circumstance which rendered such promotional conditions relevant, the position taken by the Department of Corporations with respect to the merger, was not known to Air California or the Trustees until after the preparation and mailing of the Information Statement and Application and after the holding of the Special Meeting of Air California's shareholders. The Trustees have taken the position that the non-disclosure was not "material"; various objectors have taken a contrary position. Whether or not such non-disclosure may be deemed material, the lack of such information in the Information Statement did not cause any injury to any Air California shareholder since, among other considerations: the outcome of the Special Meeting would not have been affected; prior to final approval of the merger or its consummation, the relevant information was fully disclosed to Air California's shareholders in the Supplemental Notice and in the Departmental Notice (relating to the public hearing held on May 13, 1977 in connection with the Trustees' Application For Removal of Conditions on Promotional Shares of Air California), and they were afforded two opportunities (before the Department of Corporations and this Court) to participate in public hearings related thereto; such proceedings resulted in an augmentation of the exchange rate by $2.00 per share, to a total of $15.00 per share of

Air California, clearly a benefit to such shareholders; and Air California unilaterally extended renewed appraisal rights to all Air California shareholders after all the relevant information became known. Accordingly the Court finds that such nondisclosure does not constitute a violation of Section 14 of the Securities Exchange Act, that the Information Statement was not deficient (and requires no supplementation pursuant to the Securities Exchange Act and no other supplementation beyond the Departmental Notice and Supplemental Notice) by reason of its not providing information concerning the promotional conditions, that the validity of the actions taken at the special meeting of Air California's shareholders is not affected thereby, and that the actions taken at such Special Meeting provide sufficient shareholder authorization to consummate the proposed merger.

VII

To the extent appropriate, the foregoing Conclusions of Law shall be deemed to be Findings of Fact.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, and good cause appearing; now therefore, it is

ORDERED that the Trustees' Application for Authorization to Effect a Merger with Air California, as supplemented, be, and the same is hereby, approved in all respects; and it is further

ORDERED that the Agreement and Plan of Reorganization, Agreement of Merger, Redemption Fund Agreement and issuance of Westgate Certificates, as described in the Air California Information Statement and Trustees' Application and Supplemental Application, and all amendments thereto, are specifically approved, and the Trustees are authorized and directed to take all necessary and appropriate action to implement and complete the same as soon as practicable, including, without limitation, the issuance of Westgate Certificates to the holders of Air California stock at a total exchange rate of $15.00 per share; and it is further

ORDERED that the Trustees are authorized and directed to prepare, execute and deliver such further documentation and to take such further actions as are, in their judgment, reasonable and necessary in order to consummate the merger as soon as practicable, including without limitation the amendment, modification and supplementation of the above-referenced agreements as do not materially alter the transaction taken as a whole; and it is further

ORDERED that West Coast transfer its interest in 691,279 of Air California stock to Westgate, and that the Trustees of Westgate execute a Trustees' Certificate in favor of West Coast substantially in the form attached hereto as Exhibit "B" in order to preserve the rights of West Coast to the economic value so transferred; and it is further

ORDERED that Tri-County transfer its interest in 31,696 shares of Air California to Westgate and that the Trustees of Westgate execute a Trustees' Certificate substantially in the form attached as Exhibit "C" in order to preserve the rights of Tri-County to the economic value so transferred; and it is further

ORDERED that Wescal remit $1,017,785 to Westgate, all of which funds are presently invested in certificates of deposit, to be utilized to provide funding of the Redemption Fund, and that the Trustees of

Westgate cause Westgate's accounts to reflect Westgate's obligations to Wescal for the funds so advanced and execute a Trustees' Certificate substantially in the form attached as Exhibit "D" in accordance therewith; and it is further

ORDERED that upon consummation of the merger, Westgate deliver in pledge to Valley 78% of the outstanding stock of Wacco in lieu of the Air California stock presently held in pledge by Valley which will be cancelled by reason of the merger, provided however that such pledge shall be without prejudice to the rights of any party to these proceedings, including Valley and the Debtors, with respect to Valley's claim to be a secured creditor of Westgate, as such claim existed prior to consummation of the merger; and it is further

ORDERED that the Trustees are authorized to borrow funds from UCB for the purpose of completing the funding of the Redemption Fund, substantially on the terms and conditions as heretofore described to the Court, and in connection therewith the Trustees are authorized to issue upon the funding of such loan a Trustees' Certificate substantially in the form attached hereto as Exhibit "A"; and it is further

ORDERED that the Trustees be, and they hereby are, authorized and directed to take all further actions as are necessary and appropriate in furtherance of the merger which are consistent with these Findings of Fact, Conclusions of Law and Order.

JUDGMENT in accordance with these Findings of Fact, Conclusions of Law and Order to be entered forthwith.

/s/ Leland C. Nielsen
UNITED STATES DISTRICT JUDGE